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Globalcom, Inc.	)	
	)	
vs.	)	ICC Docket No. 02-0365
	)	
Illinois Bell Telephone Company,	)	
d/b/a Ameritech Illinois	)	
	)	
In the Matter of a Complaint	)	
Pursuant to 220 ILCS 5/13–515,	)	
220 ILCS 10-101 and 10-108	)	

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**STATE OF ILLINOIS  
BEFORE ILLINOIS COMMERCE COMMISSION**

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**PETITION FOR REVIEW OF ADMINISTRATIVE LAW JUDGE’S DECISION**

Now comes Globalcom, Inc., through its attorneys, and pursuant to Section 13-515(d)(8) of the Public Utilities Act, files this Petition for Review of the Administrative Law Judge’s Decision issued September 24, 2002. This thoughtful and thorough decision properly finds that Ameritech has violated various provisions of Section 13-514 of the Illinois Public Utilities Act and grants much of the relief requested by Globalcom.

Nevertheless, there are several areas of the decision that the Commission should modify in order to enhance competition for local exchange service and implement the clear intent of the Illinois General Assembly. Additionally, there are a few changes that need to be made to the Decision in order to make it internally consistent. Therefore, for the reasons stated herein, the Administrative Law Judge’s Decision should be modified as set forth below.

## INTRODUCTION

The main issue presented in Globalcom's petition centers on the Commission's authority to exercise state police powers to regulate local competition in accord with its legislative mandate to maximize competition here in Illinois. The issue presented is whether Congress, in passing the Federal Telecommunications Act of 1996 ("federal Act"), intended to occupy the field of local and intrastate telephone service to the extent of barring the states from enforcing state laws, rules, orders and policies that are both consistent with the federal Act and intended to ensure competition through competitive access to the incumbent's telephone network. This case is **not** about interstate special access; it is about CLEC access to state tariffed combinations of network elements so that they can compete on a level playing field with Ameritech for local services. The only reason that interstate special access tariffs have encroached into this case is that, as chronicled in the "Fairness and Termination Charges" section of the ALJ's Decision<sup>1</sup>, Ameritech has used every excuse it could find to only recently begin to offer new UNE combinations such as EELs. Plus, when it finally filed its interim "compliance" tariff, Ameritech added an illegal collocation requirement. Consequently, CLECs had to order services out of Ameritech's interstate special access tariffs to provide local dedicated telecommunication services to Illinois customers.

### **I. THIS COMMISSION CAN ORDER AMERITECH TO COMPLY WITH STATE LAW.**

The issue before this Commission centers on CLEC access to UNEs to provide local telecommunication services. The ALJ's Decision declines to reverse his previous ruling granting Ameritech's motion to dismiss the portions of the complaint addressing Ameritech's FCC Special Access tariff. As set forth below, pursuant to Section 251(d)(3) of the federal Act, this Commission

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<sup>1</sup> ALJ's Decision at 16-33.

is not preempted from finding that Ameritech's interpretation of its FCC tariff results in a violation of Illinois law that will have, and is having, a serious negative impact on local exchange competition here in Illinois. Globalcom is not asking the Commission to invalidate Ameritech's FCC tariff. Rather, Globalcom is asking this Commission to order Ameritech to comply with state law and cease and desist from interpreting its FCC tariff in a manner that violates Illinois law.

Illinois is already well behind in the conversion of special access circuits to EELs. According to Ameritech, only 464 circuits had been converted by the end of March 2002 out of a total of 78,010 special access circuits.<sup>2</sup> Clearly, something is not working in this state. Based on its own experience, Globalcom believes that the termination penalties are the main detriment to conversion. Other states, including Kentucky<sup>3</sup>, Michigan<sup>4</sup>, Tennessee<sup>5</sup>, South Carolina<sup>6</sup> and Georgia<sup>7</sup>, have asserted their state police powers to order ILECs to cease assessing termination penalties when CLECs convert special access to EELs. Moreover, while the states of Florida<sup>8</sup> and Washington<sup>9</sup> have allowed the assessment of termination penalties for such conversions, those states based their decisions on contract law, not lack of jurisdiction. In other words, affirming the ALJ on this issue would leave Illinois as the **only** state to defer to the FCC and refuse to exercise its

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<sup>2</sup> Wince, Globalcom Ex. 5.0, at 3.

<sup>3</sup> *In the Matter of Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of certain terms and conditions of a proposed agreement with Bellsouth Telecommunications, Inc. pursuant to 47 U.S.C. Section 252.* Kentucky Public Service Commission. Case No. 2000-465 (June 22, 2001) at 2.

<sup>4</sup> *In the Matter of the Petition of Level 3 Communications, LLC, LLC, for arbitration pursuant to Section 252 of the federal Telecommunications Act of 1996 to establish an interconnection agreement with Ameritech Michigan*, MPSC Case No. U-12460, October 24, 2000, affirmed in *Michigan Bell Telephone Company v. Level 3 Communications*, Case No. CV 01-70908 (Slip Op. Sept. 10, 2002).

<sup>5</sup> *In Re Petition for Arbitration of the Interconnection Agreement Between AT&T Communications of the South Central States, Inc., TCG Midsouth, Inc., and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. §252.* Tennessee Regulatory Utility Commission. Docket No. 00-00079. November 29, 2001.

<sup>6</sup> *In Re Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252.* Docket No. 2000-527-C; Order No. 2001-079 (January 30, 2001).

<sup>7</sup> *In Re Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996.* Docket 11853-U. March 6, 2001.

<sup>8</sup> 2001 Fla. PUC LEXIS 825 (June 28, 2001)

<sup>9</sup> 2001 Wash. UTC LEXIS 230 (July, 2001)

authority to **even consider**, let alone determine, whether an ILEC can interpret its FCC special access tariffs in a manner that allows the assessment of termination penalties when CLECs convert FCC tariffed special access service to state tariffed UNEs.<sup>10</sup> In fact, sustaining the ALJ's Decision on this preemption ruling is even facially inconsistent with this Commission's own decision in *Level 3 Communications, Inc.*<sup>11</sup>, where it took jurisdiction over the issue but then found in Ameritech's favor based on the facts in that case.

The ALJ's Decision finds that Ameritech's interpretation of its ICC Special Access tariff violates Illinois law. But, the Decision then refuses to take the next logical step and find that the mirror image FCC tariff also violates Illinois law. The rationale given in the ALJ's Decision is that the FCC has found that such termination charges do not expressly violate any FCC regulations or orders. Those FCC orders are not relevant to this inquiry since the issue **is not** whether Ameritech is violating federal law but whether it is violating state law. By allowing Ameritech to interpret its mirror image FCC tariff in a manner that violates Illinois law, this Commission is abdicating its responsibility to enforce the Illinois Public Utilities Act.

Additionally, the ALJ's Decision establishes an arbitrary – and legally incorrect - line between Section 252 arbitration proceedings to establish interconnection agreements and complaints brought to enforce those same interconnection agreements. The ALJ's Decision correctly acknowledges that state commissions have jurisdiction to determine the applicability of termination charges for EEL conversion in Section 252 arbitration proceedings. (ALJ's Decision at 37). Indeed, this Commission assumed jurisdiction of that issue in the *Level 3* arbitration. If this

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<sup>10</sup> The ALJ's Decision notes that it is unclear from these state commission orders if they were addressing state or FCC Special Access tariffs. ALJ's Decision at 37. While that is true, it is merely a reflection of the fact that, like Ameritech's standard interconnection agreement, those ILECs' interconnection agreements appear to have simply referred to "Special Access" rather than adding the preface "state commission tariffed and FCC tariffed." There is no indication from those orders that the commissions were only addressing state tariffed Special Access service.

<sup>11</sup> Docket 00-0332, Order, Aug. 30, 2000.

Commission has jurisdiction to determine if an ILEC may assess termination charges in a Section 252 arbitration of an interconnection agreement, then it likewise has jurisdiction to make that same determination in a complaint brought to enforce that same agreement.

Finally, the refusal to consider Ameritech's interpretation of its FCC tariff is contrary to the statutory scheme established in the Telecommunications Act of 1996, which gives this Commission, not the FCC, the authority to enforce interconnection agreement terms. By failing to consider if Ameritech's interpretation of its FCC tariff is consistent with the parties' interconnection agreement, this Commission is abdicating its responsibility and leaving Globalcom without a source of relief.

**A. The FCC Orders Addressing Local Competition and CLEC Access to EELs Do Not Preempt State Jurisdiction**

Before addressing this issue, it is critical for the Commission to understand that FCC tariffs are only injected into this proceeding because Ameritech did not provide CLECs access to network element combinations of loop and transport to provision local telecommunication services from 1996 to 2001. This situation is a natural outgrowth from, what can at best be described as, that period of regulatory uncertainty that only recently both the United States Supreme Court and the Illinois General Assembly cured – ILECs are obligated to combine network elements on behalf of CLECs for UNE-P and EELs. Yet, after waiting years for this uncertainty to dissipate, CLECs are now battling Ameritech's attempts to keep the self-serving benefits of that uncertainty alive for its own anti-competitive ends.

Ameritech cannot defend the anti-competitive effect of its strategy to keep CLECs away from EELs, so instead it attempts to depart from this Commission's authority by claiming that the FCC permits and condones its actions however transparent may be the real purpose and there is

nothing that this Commission can do to stop it. The ALJ's Decision fell victim to Ameritech's attempts to keep this Commission helpless when, after reviewing the FCC orders addressing termination charges, the ALJ's Decision found that "the FCC will not overturn such tariffed charges when a provider, as here, elects to impose them." The ALJ's Decision goes on to find:

In view of those FCC pronouncements, this Commission cannot say that Ameritech is violating FCC rulings and, on that basis, order Ameritech to bring its conduct under its federal tariffs into compliance.

ALJ's Decision at 36.

The ALJ's Decision appears to make this issue hinge on deciding if Ameritech's interpretation of its FCC tariff violates federal law. That is not the role of the Commission in this proceeding. Instead, this Commission must decide if Ameritech's interpretation of its FCC tariff conflicts with and thus violates Illinois law. The simple answer to that question is that if Ameritech's assessment of termination charges under its ICC special access tariff violates Illinois law – as found convincingly by the ALJ's Decision – then its assessment of termination charges under its mirror image FCC tariff violates Illinois law as well. Thus, the Commission is not helpless and limited to asking "what would the FCC do?" Instead, the key issue that this Commission must decide is whether it is powerless to prevent Ameritech from interpreting its FCC tariff in a manner that violates Illinois law.

A review of the FCC cases shows that it has not precluded states from determining if it is a violation of state law when an ILEC interprets its FCC tariff to allow termination charges when a carrier converts special access service to EELs. There have been three categories of FCC orders on this issue. First, the *UNE Remand Order* at footnote 985 states: "We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier

to pay any appropriate termination penalties required under volume or term contracts.” (emphasis added). Thus, the FCC has held that the penalty must be “appropriate.”

Second, the FCC has addressed comments of parties in Section 271 cases that the ILEC’s imposition of termination charges should be grounds for denying a Section 271 application. In those cases, the FCC found that such charges do not explicitly violate any FCC rule. Thus, there is no reason to deny the Section 271 application on those grounds. These cases include the *Bell South Georgia and Louisiana 271 Order*<sup>12</sup>, *Pennsylvania 271 Order*<sup>13</sup> and most recently, the *Five State Bell South 271 Order*<sup>14</sup>. None of those cases indicate that the FCC is preempting states on this issue and all of these cases left open the possibility that under the proper set of facts, the termination charge may not be appropriate. The FCC acknowledged in its *Verizon Pennsylvania 271 Order* that termination penalties should not be assumed to be appropriate: “to the extent that Verizon’s tariff termination fees are not just and reasonable, the appropriate forum to challenge such fees is in the appropriate federal or state review of the specific tariff at issue.”<sup>15</sup> The FCC noted in the *Five State Bell South 271 Order*: “We have found some of these practices [disallowance of co-mingled traffic, early termination penalties, and surcharges] acceptable while others, while not preferable from the competitive LEC perspective, do not expressly violate the Commission’s rules.”<sup>16</sup> Thus, at most one could say that the FCC is unwilling to deny a Section 271 application on the issue of termination charges. It left for another day – and forum - the decision on whether in fact the termination charges of those ILECs were “appropriate.”

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<sup>12</sup> CC Docket 02-35, Memorandum Opinion and Order, FCC 02-147 (rel. May 15, 2002).

<sup>13</sup> CC Docket 01-138, Memorandum Opinion and Order, FCC 01-269 (rel. Sept. 19, 2001).

<sup>14</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, FCC 02-260, WC Docket No. 02 – 150 Memorandum Opinion and Order, September 18, 2002.

<sup>15</sup> FCC 01-269 at fn. 268.

<sup>16</sup> FCC 02-260 at para 212.

In fact, the state commissions in two of the states in the *Five State Bell South 271 Order*, Kentucky and South Carolina, have already ordered that Bell South may not interpret its Special Access tariff to assess termination charges when CLECs convert to EELs. Thus, the FCC allowed states to adjudicate this issue, even if the FCC might reach a different conclusion in a 271 proceeding in the same state.

The third type of case was the *Worldcom/Verizon Arbitration* decision,<sup>17</sup> where the FCC conducted an arbitration in place of the Virginia State Corporation Commission. In that case, the FCC applied its own policies and rules, stating: “Rule 51.807 provides, among other things, that the [Federal Communications] Commission is not bound to apply state laws or standards that would have otherwise applied if the state commission were arbitrating the section 252 proceeding.”<sup>18</sup> Thus, the FCC acknowledged that the Virginia State Corporation Commission would have applied its own state laws and standards to decide the issue of termination penalties. Similarly, in this case, the ICC must apply its state laws and standards.

In the *Worldcom/Verizon Arbitration*, the FCC could not determine the appropriateness of the termination penalties because AT&T did not challenge “the amount of the penalties, but merely their existence.”<sup>19</sup> Further, the *Worldcom/Verizon Arbitration* did not reach the issue of whether a conversion always qualifies as a termination.<sup>20</sup> Here, the ALJ’s Decision **finds** that the mirror image state tariffs are not “applicable” termination charges under the ICA and **finds** that there is not “termination” under the set of facts in this case (*See ALJ’s Decision at 14*).

Unlike in the *Worldcom/Verizon Arbitration*, this is the proper proceeding for this Commission to determine that termination penalties are inappropriate because the facts that were

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<sup>17</sup> CC Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, DA 02-1731 (July 17, 2002) (“*Worldcom/Verizon Arbitration*”).

<sup>18</sup> *Id.* at para 29.

<sup>19</sup> *Id.*

<sup>20</sup> *Worldcom/Verizon Arbitration* at ¶348.

missing from the record in the *Worldcom/Verizon Arbitration* are part of the record in this proceeding. Those facts led the ALJ to find that with regards to state tariffs, Ameritech may not charge its termination penalties. All of those facts apply equally to termination charges for the conversion of FCC tariffed special access service to EELs. None of the above facts were before the FCC in any of the proceedings when it discussed termination penalties. Therefore, based on the record before it, this Commission is not preempted from prohibiting Ameritech from interpreting its FCC tariff in a manner that violates Illinois law. The FCC has not promulgated a rule that requesting carriers must pay all termination fees for the conversion of special access circuits to UNEs. It has only commented. When the FCC is ready to attempt to preempt state commissions in this area, it will no doubt let them know. Until then, this Commission should enforce the Illinois Public Utilities Act and find that Ameritech's interpretation of its state and federal tariffs violate that law.

**B. Section 251(d)(3) Of The Federal Telecommunications Act Provides The Commission With Jurisdiction To Consider Ameritech's Interpretation Of Its FCC Special Access Tariff.**

This Commission has the authority to establish and enforce any state regulation, order or policy that establishes access obligations of local exchange carriers so long as the regulation, order or policy is consistent with the requirements of Section 251 and does not substantially prevent implementation of the requirements of the Act and its purposes. 47 U.S.C. § 251(d)(3).<sup>21</sup> The ALJ's Decision finds that Ameritech's interpretation of its ICC Special Access tariff violates

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<sup>21</sup> 47 CFR 251 (d) (3) PRESERVATION OF STATE ACCESS REGULATIONS.--In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

various sections of the Public Utilities Act, including Sections 13-514(6), (8) and (11) and Section 13-801. ALJ's Decision at 15. Of course, Ameritech's FCC Special Access tariff is a mirror image of its state tariff, so whatever state laws are violated by its interpretation of one are violated by its interpretation of the other. Nevertheless, the ALJ's Decision finds that Section 251(d)(3) does not apply in this case, stating:

FCC tariffs exist exclusively under federal authority. There is no overlapping state/federal jurisdiction over them. We cannot stop the FCC from approving them initially, and we cannot block their enforcement later. Globalcom is apparently confusing jurisdiction over special access with jurisdiction over the tariffs authorizing special access. This Commission has power over special access, but only when it is provided under an Illinois tariff. Thus, subsection 251(d)(3) has no application in this instance. With regard to FCC tariffs, there is no state power to preserve.

ALJ's Decision at 37.

This case is not about special access; it is about access to UNEs. The ALJ's Decision incorrectly narrows the focus of Section 251(d)(3) and unnecessarily clouded the issue. To begin with, Section 251(d)(3) relates expressly to the interplay between FCC and state authority over access and interconnection. It expressly **prohibits** the FCC from issuing any orders, rules or policies that "preclude the enforcement of any regulation, order, or policy of a State Commission" that provides for access and interconnection and is consistent with Section 251.<sup>22</sup> Yet, the ALJ's Decision assumes that the FCC wants to preclude enforcement of state law relating to UNEs and that it has the right to do so. Neither assumption is true.

The reasoning of the ALJ's Decision on that issue alone is fatal to its conclusion, but it further errs because nothing in Section 251(d)(3) indicates that it only applies to areas in which there is joint FCC and state jurisdiction. If, as here, a LEC's interpretation of its FCC tariff results in a violation of state law that affects local access to network elements, then the ICC is within its

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<sup>22</sup> 47 U.S.C 251(d)(3)

jurisdiction to intervene and preserve state access regulations. This Commission **has** unquestioned jurisdiction over ICC tariffed UNEs. Ameritech's interpretation of its FCC tariff essentially prohibits CLECs from purchasing services under those state tariffed UNE services. Thus, there is existing "state power to preserve" in this case.

This Commission should carefully consider the impact of this line of reasoning. What if Ameritech files an interstate special access tariff that provides for a non-recurring charge of \$1,000 to convert an interstate special access circuit to an EEL? This Commission in Docket No. 98-0396 has already ordered that the non-recurring charge is \$1.02. Under the reasoning of the ALJ's Decision, there is nothing this Commission can do to prevent Ameritech from assessing that non-recurring charge. Another example is that two of the remaining issues in Docket No. 01-0614 are whether CLECs can commingle UNEs with tariffed services and whether the FCC's Local Use Test applies here in Illinois. Under the reasoning of the ALJ, this Commission could conclude that neither the commingling rule or the FCC's Local Use Test apply here in Illinois, but nonetheless Ameritech could file an interstate special access tariff, consistent with federal law, that requires that all special access circuits to EELs must comply with the commingling requirement and the FCC Local Use Test. Consequently, whenever this Commission departs from the FCC on a matter of access regulation, then Ameritech can thwart the Commission's efforts by amending its FCC Special Access tariff.

But, the law is clear. Commission orders do not have to be consistent with FCC orders, only with Section 251 of the federal Act. The ALJ's Decision acknowledges that state commission orders do not have to be consistent with all of the FCC's regulations promulgated under Section 251. ALJ's Decision at 37. That part of the ALJ's Decision agrees with the law. In *IUB I*, the 8<sup>th</sup>

Circuit rejected the FCC's assertion that state interconnection regulations had to be consistent with its own, stating:

The FCC's conflation of the requirements of Section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.<sup>23</sup>

If the state commission can promulgate regulations, orders and policies that are inconsistent with FCC regulations in accordance with subsection 251(d)(3), then it is certainly true that the same can be said for Ameritech's interpretation of tariffs filed with the FCC. In the present case, the evidence shows convincingly that Ameritech's state and federal terminations fees are anti-competitive and preclude Globalcom from using state tariffed UNE combinations. The natural result of this situation is that competition here in Illinois is impaired, if not severely restricted. The Commission need look no further than the fact that Ameritech did not receive its first conversion request until August 2001 and as of the end of March 2002 had converted only 464 of its 78,010 special access circuits.<sup>24</sup>

The evidence shows that the Illinois General Assembly directed this Commission to require Ameritech "to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunication service offerings."<sup>25</sup> When only 464 of 78,010 special lines are converted to EELs almost two years after the FCC's *Supplemental Report and Order*, which

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<sup>23</sup> *Iowa Utilities Board v. FCC*, et al., 120 F.3d 753, 806 (8<sup>th</sup> Cir. 1997). "IUB I".

<sup>24</sup> Wince, Globalcom Ex. 5.0, at 3.

<sup>25</sup> 220 ILCS 5/13-801(a).

provided for such conversions, it is obvious that carriers are not able to use UNEs “to the fullest extent possible.”

The only way this Commission can implement the Illinois PUA is to address the root of the problem: Ameritech’s insistence on charging termination fees for conversions from ICC **and** FCC Special Access service to EELs. Therefore, pursuant to 47 USC 251 (d)(3), this Commission is not precluded from prescribing a regulation, order or state public policy that finds that Ameritech may not consider such conversions to be a “termination” under its FCC tariff that allows it to charge termination fees.

The original ruling of the ALJ granting Ameritech’s Motion to Dismiss took the position that the Commission “cannot invalidate or alter Ameritech’s federal special access tariff, even if that tariff causes what the Commission might conclude is an anti-competitive result in Illinois.”<sup>26</sup> The ALJ’s Decision takes a similar position when it finds that this Commission has no power to challenge Ameritech’s interpretation of its FCC tariff, even though the ALJ’s Decision finds that the exact same interpretation of the exact same provision in Ameritech’s ICC tariff violates various provisions of the Public Utilities Act.

This Commission should reject the view that the State of Illinois is at the mercy of whatever tariff Ameritech files with the FCC. The Illinois Supreme Court has held that states need not defer to FCC tariffs if a legitimate state interest is involved. In *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428 (May 21, 1986), subscribers of MCI’s long-distance telephone service sued in Illinois court alleging violations of state statute. MCI maintained that although the plaintiff alleged state law theories of liability, in reality the defendant was challenging “FCC-regulated charges,

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<sup>26</sup> ALJ’s Ruling on Ameritech’s Motion to Dismiss at 6.

practices and tariffs” and thus the state-law actions were preempted by the Federal Act.<sup>27</sup> The Illinois Supreme Court disagreed and held that the state law claims were not preempted by federal law. The Court held that the relevant inquiry is what are the “precise contours” of the field that Congress has chosen to occupy.<sup>28</sup> The Court concluded:

Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.<sup>29</sup>

Such State-law claims need not be limited to traditional common law actions such as fraud, breach of contract or deceptive practices. The policy set forth by the General Assembly in Article 13 of the Public Utilities Act provides equally valid state law claims. All that is necessary is that such claims be separate from those set out in the relevant federal law. As stated by the Court:

However, we believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act." (*Comtronics, Inc. v. Puerto Rico Telephone Co. (1st Cir. 1977), 553 F.2d 701, 708.*) State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.<sup>30</sup>

States have always had jurisdiction over local exchange service and the federal Act maintains that jurisdiction in Section 252(d)(3). The mandates in Section 13-801 of the Public Utilities Act relating to UNEs are “duties distinguishable from those created under the [federal] Act.” Ameritech’s interpretation of its FCC tariff is a breach of that duty. Ameritech’s

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<sup>27</sup> *Kellerman*, 112 Ill.2d at 440.

<sup>28</sup> *Id.* at 441.

<sup>29</sup> *Id.* at 443-444.

<sup>30</sup> *Kellerman*, 112 Ill.2d at 442-43

interpretation has a significant negative impact on local exchange competition by severely limiting the ability of carriers to use **state tariffed** EELs.

Chief Justice Rehnquist has acknowledged that carriers may not hide behind their tariffs when faced with claims based on state law:

the tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on petitioner to refrain from intentionally interfering with respondent's relationships with its customers.... The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law.<sup>31</sup>

The FCC has not preempted this Commission from finding that Ameritech's interpretation of its FCC tariff violates Illinois law in the same way that its interpretation of its ICC tariff violates Illinois law. The "precise contours" of the FCC's interpretation of termination penalties only consist of the FCC's acknowledgement that termination penalties do not violate any of its current regulations. The FCC has not presented guidelines regarding what it considers appropriate termination penalties, and in fact the FCC invited challenges to the justness or reasonableness of termination penalties to be heard in "the appropriate forum."<sup>32</sup> Globalcom has accepted that invitation and filed this case. Further, Globalcom has presented this Commission with evidence that was not before the FCC when it expressed its opinion in the various cases in which it has addressed this issue. This evidence includes the following:

- The Ameritech/Globalcom IAC provides that Globalcom shall pay only "applicable" termination charges upon conversion of special access service to EELs.<sup>33</sup>
- Ameritech's special access tariff does not have a specific reference to the application of termination charges when a carrier converts to EELs.

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<sup>31</sup> *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118, S. Ct. 1956, 1966 n7 (1998). (Rehnquist, C.J. concurring).

<sup>32</sup> *Pennsylvania 271 Order* at fn. 268.

<sup>33</sup> Globalcom/Ameritech ICA, Schedule 9.5, Section 2.03

- Ameritech's tariff only provides for termination charges when there is "termination of service prior to the expiration term of the OPP."<sup>34</sup>
- Globalcom has committed to taking EELs for each converted circuit for the same length of time as it had committed to taking special access service.<sup>35</sup>
- Ameritech has a long history of refusing to provide new EELs service. Although the ALJ's Decision finds that the rulings of the Eighth Circuit allow Ameritech to escape a finding of bad faith, the fact remains that Ameritech's actions forced CLECs to purchase special access service.<sup>36</sup>
- Ameritech's special access service rates are structured so that month-to-month service is generally more expensive than the month-to-month rates of ISDN service (Ameritech's comparable retail product that competes against CLEC's special access services) and is always more expensive than term agreements for ISDN service.<sup>37</sup> CLECs are thus forced to purchase special access service pursuant to term agreements instead of on a month-to-month basis.<sup>38</sup>
- Ameritech has only converted 464 special access service circuits to EELs out of the 78,010 special access circuits on its system.<sup>39</sup>

None of the above facts were before the FCC in the proceedings when it discussed termination penalties. Globalcom does not believe this Commission should attempt to ask itself "What would the FCC do in this case?" This Commission must decide if Ameritech is violating Illinois law, not the FCC's policy. In any event, the FCC has not been presented with a record such as the one before this Commission. Just as important, the FCC has not been presented with extensive findings by a state commission, such as those made in the ALJ's Decision. Here, Ameritech has been found to have violated state law by imposing an illegal collocation requirement and by charging termination fees. Faced with those facts and such a state commission order, it is not clear that the FCC would come to a different conclusion than this Commission.

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<sup>34</sup> FCC Tariff No. 2, Section 7.4.10(c).

<sup>35</sup> First Amended Verified Complaint at ¶27.

<sup>36</sup> ALJ's Decision at 28.

<sup>37</sup> Wince, Globalcom Ex. 5.1.

<sup>38</sup> Globalcom Initial Brief at 23. Wince, Globalcom Ex. 5.0 at 5-6.

<sup>39</sup> Globalcom Initial Brief at 21. Wince, Globalcom Ex. 5.0 at 3.

This Commission should understand that Globalcom is not requesting that it interpret an FCC tariff in isolation. This particular tariff, as applied by Ameritech, has a significant impact on a matter that is clearly within this Commission's jurisdiction: UNEs and EELs used to provide local exchange service. Moreover, the Illinois General Assembly has given specific instructions on the need to enhance local exchange competition through the wide availability of UNEs. It will be impossible for this Commission to implement that mandate if it allows ILECs to hide behind their FCC tariffs. When, as here, an ILEC attempts to interpret its vague FCC tariff to allow it to prevent a CLEC from obtaining services available through state tariffs, this Commission must step in and assert its authority.

As the ICC recently stated in its investigation of Section 13-801 of the new Telecommunications Act,

Conversely, we are concerned about Ameritech's proposed language relating to the congruity between state and federal law. As long as Ameritech operates in Illinois, it will, in our opinion be required to comport itself with the laws and regulations of the State. In this order we have concluded that the legislature has enacted legislation that differs from federal law and that we are bound to enforce and interpret that legislation. To that end, Ameritech must remove the phrase "to the extent not inconsistent with" from its reservation of rights language.

ICC Docket No. 01-0614 at 123. (emphasis added).

Finally, the United States Supreme Court has addressed preemption in the context of the FCC and state joint jurisdiction granted in the Telecommunications Act of 1996. In *IUB II*, Justice Beyer stated:

The scope of the FCC's legal power to apply an explicit grant of [general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates.] Cf. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376-377, n. 5, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). And here, as just explained, the 1996 Act [foresees] the reservation of most local ratesetting authority to local regulators.

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The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (["presumption against the pre-emption of state police power regulations"]); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947) (requiring ["clear and manifest" showing of congressional intent to supplant traditional state police powers].) Moreover, the Communications Act itself, into which Congress inserted the provisions of the 1996 Act with which we are here concerned, comes equipped with a specific instruction that courts are *not* to "construe" the FCC's statutory grant of authority as "giving the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication." 47 U.S.C. § 152(b).<sup>40</sup>

Here, the General Assembly has set forth requirements that the ALJ's Decision finds Ameritech violated as to its ICC Special Access tariff. Ameritech's interpretation of its mirror image FCC tariff obviously violates those requirements as well. Pursuant to the preemption guidelines discussed in *IUB II*, this Commission has the authority – indeed the duty – to find that Ameritech's interpretation of its FCC tariff also violates Illinois law.

**C. The ALJ's Decision Creates A Distinction Between Arbitration and Enforcement Proceedings That Is Not Based On Law.**

With respect to Ameritech's FCC tariff, the ALJ's Decision disregards the findings of the state commissions in Michigan, Kentucky, Tennessee, South Carolina and Georgia on the grounds that they all involved Section 252 arbitration proceedings. The ALJ's Decision reasons that:

each of the Commissions was determining *the contents of a prospective ICA*, over which the state commission has express authority under Section 252 of the Federal Act. Because of that authority, a state commission is free to exclude *from the ICA* those provisions that do not comport with the commission's view of either state or federal law (so long as the state commission's view does not contravene Section 251 or obstruct implementation of the Federal Act).

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<sup>40</sup> *AT&T et al. v. IURB et al.*, 525 U.S. 366, 420-1 (1999).

In contrast, the present case is not an arbitration concerning the contents of a prospective ICA. Thus, the Commission is not being asked to establish the terms that will reside in an agreement over which we have express jurisdiction, but to block the operation of a tariff over which we have no jurisdiction.

ALJ's Decision at 37-38 (footnote omitted)

There are several defects with this reasoning. First, Globalcom is not asking the Commission to "block" the operation of an FCC tariff. Globalcom is merely asking the Commission to do exactly what the ALJ's Decision does with Ameritech's mirror image state Special Access tariff: determine that Ameritech's interpretation of that tariff violates Illinois law. Thus, it is Ameritech's interpretation that is being blocked, not the tariff itself.

Second, the ALJ's Decision creates an improper distinction between Section 252 arbitration proceedings and enforcement of ICA proceedings. Apparently, all of the Section 252 arbitration proceedings that have addressed the issue of termination charges do so in the context of both state and federal tariffed special access services. This Commission also addressed both in the *Level 3* arbitration. Thus, the ALJ's Decision correctly acknowledged that jurisdiction over FCC tariffed special access service is proper in a Section 252 arbitration. ALJ's Decision at 37. Why would state commissions not have authority to adjudicate the exact same dispute in an enforcement proceeding? The ALJ's Decision can only say that the difference is that:

The Commission cannot render the same interpretation with regard to the pertinent FCC tariffs, because, as stated above, the FCC has concluded that conversion does trigger early termination penalties

ALJ's Decision at 38.

Thus, the ALJ's Decision finds that state jurisdiction is dependent on concurrence with FCC policy. Thus, the principle set forth in the ALJ's Decision appears to be that if the state agrees with what it believes the FCC would do, then it can assert jurisdiction. But if it does not agree with what

it thinks the FCC might do, then it must refrain from ruling. This principle obviously is not supported by any law and is entirely inconsistent with the constitutional principle of preemption.

**D. The ALJ's Decision Is Not Consistent With The Framework Of The Federal Act.**

The ALJ's Decision undermines the statutory framework of the federal Act. The authority of this Commission to interpret and enforce the terms of the parties' interconnection agreement necessarily includes the authority to challenge the parties' interpretation of applicable state and federal tariffs. The federal Act sets forth the procedure for the negotiation, mediation and approval of interconnection agreements.<sup>41</sup> The FCC and the federal courts have further interpreted Section 252 to create a process that involves state commissions and federal courts, and that process only involves the FCC where the state commission has "failed to act."<sup>42</sup>

The Act authorizes state commissions to mediate and arbitrate disputes over interconnection agreements during negotiations.<sup>43</sup> The FCC and the federal courts have interpreted this grant of authority to the states to include the authority to interpret and enforce specific provisions contained within interconnection agreements.<sup>44</sup> Section 252(e)(6) of the federal Act further states that the proper forum for an aggrieved party to file an action arising from the state commissions' exercise of

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<sup>41</sup> 47 U.S.C. Sec. 252.

<sup>42</sup> *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 836 (the FCC does not have the authority to review or examine the underlying reasoning for the commission's conclusions in a Section 252 proceeding and the FCC specifically declined to do so "the Bureau [FCC] thus declined to look beyond DTE's decision to question the substantive validity of the state agency's judgement").

<sup>43</sup> 47 U.S.C. Sec. 252; *Southwestern Bell Telephone Co. v. Brooks Fiber Communications*, 235 F.3d 493 (10<sup>th</sup> Cir. 2000) (inherent in state commissions' express authority to mediate, arbitrate and approve interconnection agreements under Section 252 is the authority to interpret and enforce previously approved agreements.)

<sup>44</sup> *Southwestern Bell Telephone Co. v. Brooks Fiber Communications*, at 479; see also *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 n. 24; *In the Matter of Starpower Communications*, 15 F.C.C.R. 11277, para. 7 (2000).

authority is an appropriate Federal district court.<sup>45</sup> The FCC is not a part of this process unless and until a state commission fails to “act to carry out its responsibility” under Section 252, which includes “the failure to interpret and enforce existing interconnection agreements.”<sup>46</sup> This is the scheme set out by Congress, the Federal district courts and the FCC. The FCC has no role unless the state commission fails to act.

This scheme would be significantly impaired if this Commission were to limit its authority to interpret federal tariffs that are necessarily part of the interconnection agreement at issue. Where the interpretation or enforcement of an interconnection agreement necessarily involves the interpretation and application of a federal tariff, this Commission has the authority and the obligation under Section 252 to interpret the tariffs in order to resolve the dispute. Otherwise, the scheme would be significantly disrupted as the Commission bifurcates non-FCC tariff related issues from FCC tariff related issues, thus forcing the aggrieved party to go to both the state commission and the FCC.

In fact, that is exactly what the ALJ’s Decision invites Globalcom to do – to file a complaint with the FCC. ALJ’s Decision at 38. But the Commission must remember that the essence of Globalcom’s claim is that Ameritech’s interpretation of its FCC tariff violates Illinois law. The Act does not provide any authority for the FCC to make such a determination. By forcing Globalcom to bifurcate its claim and approach both agencies, this Commission would be forcing Globalcom to engage in a wasteful and fruitless process not contemplated in the federal Act.

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<sup>45</sup> *Southwestern Bell Telephone Co. v. Brooks Fiber Communications*, at 497 (holding that federal district court jurisdiction necessarily includes review of state commission interpretation and enforcement of federally mandated interconnection agreement.)

<sup>46</sup> *In the Matter of Starpower*, at 11280.

## **II. GLOBALCOM'S DAMAGES SHOULD NOT BE LIMITED TO THOSE ASSOCIATED WITH ITS ICC TARIFFED SPECIAL ACCESS CIRCUITS.**

There is a matter that must be clarified to ensure consistency and integrity of the ALJ's Decision. This issue relates to damages from Ameritech's anti-competitive action in limiting Globalcom's service options by illegally requiring a collocation arrangement. This issue is **not** dependent on the Commission's action on Globalcom's request that it reverse the ALJ's granting of Ameritech's motion to dismiss the counts relating to Ameritech's FCC tariff.

The ALJ's Decision concluded that Ameritech Illinois' Interim Compliance Tariff for Section 13-801 violated Section 13-514 of the Act by inserting a collocation requirement that restricted CLECs' access to EELs. The ALJ's Decision concluded that Ameritech Illinois violated Section 13-514 of the Act because its collocation requirement was a "unilaterally fashioned definition that derogates clear regulatory principles and [had] the self-serving effect of limiting the availability of EELs to competitors."<sup>47</sup>

The ALJ's Decision further determined that the evidence showed that Globalcom suffered damages as a direct result of this illegal collocation requirement for new EELs in two respects. First, Globalcom was forced to purchase the more expensive new special access circuits instead of new EELs from December 19, 2001 to July 11, 2002.<sup>48</sup> Second, Globalcom was further damaged beginning on December 19, 2001 because it was unable to order new DS3s as EELs in order to convert all of its month-to-month special access circuits to less expensive, cost-based EELs.<sup>49</sup>

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<sup>47</sup> ALJ's Decision at 33

<sup>48</sup> Id. at 40

<sup>49</sup> Due to the FCC's commingling prohibition, Globalcom must configure its circuits so that all of the T-1s on a particular DS3 are EELs providing local service. Globalcom thus must order new DS3s as EELs in order to carry new T1 circuits and circuits converted from Special Access.

However, the ALJ's Decision improperly limited these damages to those services purchased from Ameritech's intrastate tariff.

That limitation is not necessitated by the ruling on addressing Ameritech's FCC tariffs. Even if this Commission believes that it cannot address that issue, it should still find that Globalcom was damaged by being required to order new special access circuits under Ameritech's FCC tariffs after December 19, 2001. But for Ameritech's collocation requirement, Globalcom would have purchased new EELs instead of new FCC special access service after that date.<sup>50</sup> Thus, it has been damaged by paying higher special access service charges for all special access circuits – state and federal – purchased after December 19, 2001.

Similarly, Globalcom has been damaged by not being able to convert to EELs any of its month-to-month FCC tariffed special access circuits that qualify under the FCC's rules for conversion. These would include circuits that were already month-to-month as of December 19, 2001 and circuits that became month-to-month circuits after that date as their OPP plans expired. Again, but for Ameritech's collocation requirement, Globalcom would have converted these month-to-month circuits to EELs. Termination liability would not have been an issue because there is no termination liability for the conversion of month-to-month circuits. The **only** reason these circuits were not converted was Ameritech's illegal collocation requirement.

Globalcom is not asking the Commission to order Ameritech to interpret, apply or modify its interstate tariffs for special access. Instead, Globalcom is seeking damages to make itself whole from the imposition of the illegal collocation requirement. For that reason, those damages equally apply to services that were purchased through Ameritech's interstate tariff. The Commission

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<sup>50</sup> Globalcom Ex. 2.0 (Wurster) at 7.

should therefore remove the word “intrastate” as a limitation from each paragraph in Section H (2) of the Decision.

### **III. THE COMMISSION SHOULD NOT LIMIT GLOBALCOM’S ATTORNEY’S FEES TO ONE HALF OF REASONABLE CHARGES.**

The ALJ’s Decision errs in reducing Globalcom’s attorney’s fees. Globalcom filed a five Count complaint and prevailed on each Count. Consistent with Globalcom’s allegations, the ALJ’s Decision finds that Ameritech knowingly and unreasonably impeded the development of competition and violated subsections (6), (8), (10) and (11) of Section 13-514 of the Act. Those arguments where Globalcom did not prevail nonetheless shared the same common core of facts and related legal theories as those where it did prevail. The ALJ’s decision to cut Globalcom’s award for attorney’s fees and costs is contrary to the plain meaning of Section 13-516(a)(3), public policy, and Commission practice.

Subsection 13-516(a)(3) is clear and unambiguous. By statute, this Commission must grant Globalcom all reasonable attorney’s fees and costs for Ameritech’s violation of Section 13-514. When construing a statute, the Commission’s primary objective is to ascertain and give effect to the General Assembly’s intent.<sup>51</sup> Legislative intent is determined best through the statutory language.<sup>52</sup> The Commission must begin with the language of the statute, which must be given plain and ordinary meaning.<sup>53</sup>

The basis given in the ALJ’s Decision to “chop” the attorney’s fees and costs is that Globalcom did not prevail on every argument. However, Section 13-516(a)(3) mandates that the Commission **shall** award attorney’s fees and costs. The General Assembly’s use of the word

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<sup>51</sup> *Boaden v. Department of Law Enforcement*, 171 Ill.2d 230, 664 N.E.2d 61 (1996).

<sup>52</sup> *In re Application of the County Collector of Du Page County for Judgment for Delinquent Taxes for the Year 1992*, 181 Ill.2d 237, 692 N.E.2d 264 (1998).

<sup>53</sup> *Davis v. Toshiba Machine Co.*, 186 Ill.2d 181, 710 N.E.2d 399 (1999).

“shall” is a clear expression of the intent to impose upon this Commission a mandatory obligation.<sup>54</sup>

What is noticeably omitted from that section is any provision that the Commission is obligated to award a portion, a sum, or a significant part of attorney’s fees. To the contrary, the General Assembly’s intent is clear – violators of the Act pay all attorney’s fees and costs.

Typically, statutory attorney’s fees make parties whole and give incentives to bring suit and vindicate rights.<sup>55</sup> Similarly, Subsection 13-516(a)(3) was designed to encourage telecommunications carriers to seek legal vindication of their statutory rights and further the goals of the Act. The ALJ’s Decision to arbitrarily reduce attorney’s fees undercuts the important policy incentives to encourage private litigants to bear the expense of litigation to vindicate not only their own rights but to further the public interests as well. A private litigant’s ability to recover all of its litigation costs that are statutorily provided should not be limited where the ultimate purpose of the litigation is achieved, such as the present case where Globalcom succeeded on all of the Counts of the Complaint.

Courts have set standards to prevent “chopping” of statutory attorney’s fees and costs. In Illinois, *all* statutory attorney fee awards should go to the prevailing party so long as there is a “common core of facts” shared among the successful and unsuccessful claims.<sup>56</sup> Courts engage in “chopping” only where the litigation is a series of separate and discrete claims, so that statutory attorney’s fees and costs can be clearly linked to claims where the prevailing litigant did or did not prevail<sup>57</sup>, thereafter cited and adopted by the Illinois Appellate Court in *Berlak*<sup>58</sup>. Stated another

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<sup>54</sup> *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill.App.3d 231, 235, 671 N.E.2d 768 (1996) (the use of the word “shall” in a statute is indicative of a mandatory legislative intent).

<sup>55</sup> *Berlak* 284 Ill.App.3d at 236; *Becovic v. City of Chicago*, 296 Ill.App.3d 236, 694 N.E.2d 1044, 230 Ill.Dec. 766 (1998).

<sup>56</sup> *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill.App.3d 1043, 769 N.E.2d 134, (Apr. 26, 2002); *J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership*, 325 Ill.App.3d 276, 281, 757 N.E.2d 1271 (Oct. 10, 2001) (there can be only one prevailing party, absent consent, and that attorney’s fees should not be reduced).

<sup>57</sup> *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

way, those issues or claims that are “so inextricably intertwined . . . cannot and should not be distinguished for the sole purpose” of reducing or “chopping” statutorily created awards for *all* reasonable attorney’s fees and costs.<sup>59</sup>

Further, the ALJ’s Decision is also contrary to the Commission’s most recent implementation of Section 13-516(a)(3). On May 8, 2002, the Commission ordered Ameritech to pay all attorney’s fees, costs for Z-Tel Communications and the Commission’s costs incurred in that Docket where it was ultimately determined that Ameritech violated Section 13-514 of the Act.<sup>60</sup> In that proceeding, Z-Tel Communications alleged two counts, the first, a violation of Section 13-514, and second, a breach of the interconnection agreement. Z-Tel Communications prevailed on Count I but not on Count II.

Additionally, the ALJ’s Decision states that the parties failed to address the issue of attorney’s fees and costs in their briefs. While Globalcom agrees that there was little discussion in the briefs, Globalcom believes that it is not appropriate or necessary to brief attorney’s fees at that stage in this case. The typical procedure for detailing and requesting attorney’s fees and costs comes after the order of the court or administrative agency.<sup>61</sup>

Finally, Globalcom objects to the ALJ’s decision to allow Ameritech sixty (60) days to pay the attorney’s fees and costs. ALJ’s Decision at 42. Subsection 13-516(e) expressly states that “[p]ayment of damages, attorney’s fees, and costs imposed under Subsection (a) shall be made within 30 days after issuance of the Commission order . . . unless otherwise directed by the Commission.” The Commission’s recent Z-Tel Order required Ameritech to pay damages,

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<sup>58</sup> *Berlak* 284 Ill.App.3d at 238 (All statutory attorney’s fees and costs were awarded even though the plaintiff prevailed on only one count of the four-count complaint since all the claims shared the same core operative facts).

<sup>59</sup> *Ardt v. State of Illinois*, 292 Ill.App.3d 1059, 687 N.E.2d 126, (1997).

<sup>60</sup> *Z-Tel Communications, Inc. v. Illinois Bell Telephone Company*, Docket 02-0160.

<sup>61</sup> *Berlak*, 284 Ill.App.3d at 231.

attorney's fees, and costs within thirty (30) days. The Commission should not depart from that standard absent a showing by Ameritech that thirty days is insufficient.

#### **IV. THE COMMISSION SHOULD REVERSE THE PORTION OF THE ALJ'S DECISION WAIVING PENALTIES AGAINST AMERITECH AND INITIATE A DOCKET TO SET PENALTIES.**

In Globalcom's Complaint proceeding filed pursuant to Section 13-515 of the Act, the ALJ's Decision found that Ameritech knowingly and unreasonably impeded competition in violation of subsections (6), (8), (10) and (11) of Section 13-514. Despite these findings, the ALJ's Decision declined to assess penalties and instead waived penalties. Respectfully, the ALJ's Decision is in error. Instead of relying on Sections 13-304 and 13-316 of the Act, the ALJ's Decision incorrectly relies on sections of the administrative code that are inconsistent with the newly amended Act. The ALJ's determination that the Commission should "waive" penalties pursuant to Section 13-516(b) is inconsistent with the plain meaning of the statute and the extraordinary circumstances that the General Assembly provided as examples justifying waiver – "technological infeasibility and *acts of God*."<sup>62</sup> (emphasis added).

It is the duty of the Commission to ensure that the provisions of the Act are enforced and obeyed.<sup>63</sup> This includes the statutory duty to ensure that violations of the Act are promptly prosecuted and penalties due the State therefore are recovered and collected.<sup>64</sup> See; *Citizens for a Better Environment v. Illinois Commerce Commission*, 103 Ill.App.3d 133 (4<sup>th</sup> Dist. 1981). Section 13-516(2) specifically empowers the Commission to assess penalties for a second violation and any subsequent violation of Section 13-514. The civil penalties for violations of Section 13-514 flow to

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<sup>62</sup> 220 ILCS 5/13-516(b). "The Commission may waive penalties imposed under subdivision (a)(2) if it makes a written finding as to its reasons for waiving the penalty. Reasons for waiving the penalty shall include, but not be limited to, technological infeasibility and acts of God."

<sup>63</sup> 220 ILCS 5/4-201

<sup>64</sup> Id.

the Illinois Common School Fund for the benefit of the citizens of Illinois.<sup>65</sup> The discretionary powers of the Commission cannot be exercised in an arbitrary and capricious manner. See, *Gray Panthers v. Department of Insurance*, 110 Ill.App.3d 971 (1<sup>st</sup> Dist. 1982).

Section 13-304 and 13-516 of the Illinois Telecommunications Act, enacted July 1, 2001, set forth a statutory procedure for the Commission to assess penalties against a telecommunications carrier for violations of the Act and Section 13-514 in particular.<sup>66</sup> Section 13-304 was enacted on July 1, 2001 and Section 13-516 was amended on July 1, 2001. It was therefore error for the ALJ to rely on the procedures set forth in 83 Ill.Ad.Code 766.400 since those provisions pre-date Section 13-304 and the revisions to Section 13-516.

The statute contemplates a second proceeding for the purpose of assessing penalties once the Commission determines that a telecommunication carrier has violated Section 13-514. Under Section 13-516(a)(2), the Commission may impose penalties up to \$30,000 for a second or subsequent violation of Section 13-514. Under Section 13-304, this Commission may assess penalties after notice and an opportunity to be heard.<sup>67</sup> It therefore appears that these two statutory provisions interplay in such a way that after a violation of 13-514 is found, under Section 13-516 the Commission may begin proceedings to assess civil penalties under Section 13-304. Section 13-304 does not carve out an exception for civil penalties under Section 13-516.

Admittedly, the Commission has not yet had the experience with this statutory interplay. However, the Commission in *Z-Tel Communications, Inc. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 02-0160 did rule after finding that Ameritech Illinois violated

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<sup>65</sup> 220 ILCS 5/13-516(e)

<sup>66</sup> Globalcom notes that 83 Ill.Ad.Code 766.400 which predates the 2001 amendments to the Illinois Telecommunications Act is inconsistent with Section 13-304 which was new when enacted on July 1, 2001.

<sup>67</sup> 220 ILCS 5/13-304(a)

Section 13-514 that a proceeding should be initiated against Ameritech Illinois to determine whether the Commission should seek civil penalties.

Globalcom has met its burden of proof and shown that Ameritech knowingly violated state and federal law and violated Section 13-514. The ALJ agreed with Globalcom and specifically found that “Ameritech’s inclusion of a collocation requirement for EELs in its Interim Compliance Tariff was a knowing and unreasonable impediment to the development of competition, prohibited under subsections (6), (8), (10) and (11) of Section 13-514 of the Public Utilities Act.”<sup>68</sup> The ALJ also agreed that the evidence showed that Ameritech’s attempt to collect termination fees from Globalcom under the intrastate tariffs was a “knowing and unreasonable impediment to the development of competition, prohibited under subsections (6), (8) and (11) of the Public Utilities Act.”<sup>69</sup>

Therefore, Ameritech Illinois is subject to penalties for its violations of the Act. In furtherance of the Commission’s statutory duties to enforce the Act, prosecute violations and recover penalties, the ALJ should have issued a finding in its Written Decision that the Commission should initiate a proceeding to determine whether it should assess civil penalties against Ameritech Illinois, as it did in *Z-Tel*. The Commission is well aware of Ameritech Illinois’ past anti-competitive behavior, which it has noted in numerous Orders. This is at least the second, if not the third, time this Commission has found that Ameritech Illinois violated Section 13-514 of the Act.<sup>70</sup> Considering Ameritech Illinois’ past behavior and the considerable effort that the General Assembly went through to ensure Ameritech’s Illinois compliance, this Commission should not give Ameritech Illinois a free pass after the ALJ already determined that Ameritech “knowingly”

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<sup>68</sup> ALJ’s Decision p. 43

<sup>69</sup> *Id.* at 42-43

<sup>70</sup> *ASCENT v. Ameritech*, ICC Docket No. 00-0024 (Order On Rehearing, Feb. 20, 2002) at 15-16; *Z-Tel Communications, Inc. v. Illinois Bell Telephone Co.*, ICC Docket No. 02-0160 (Final Order May 8, 2002) at 17-18.

impeded competition.<sup>71</sup> It appears that the Commission is acting arbitrarily when it simply waives penalties to avoid the time and expense of complying with the statutory requirements for assessing penalties.

Globalcom met its burden of proof for the assessment of penalties. The ALJ, however, has placed an additional burden on Globalcom to step into the quasi-judicial shoes of the Commission to determine the amount of the penalties prior to an ICC ruling on whether Ameritech Illinois violated the Act and Section 13-514. Globalcom respectfully submits that statutorily it should not, and in fact, cannot shoulder such an additional responsibility. The important task for assessing and determining penalties falls to this Commission, the agency charged with enforcement of the Act, not Globalcom.<sup>72</sup> As a practical matter, Globalcom, and any other private litigant, is not necessarily privy to all of the experiences and expertise that the Commission would necessarily bring to bear in assessing the severity of civil penalties. In other words, this is a decision within the particular expertise of the Commission, not Globalcom.

The ALJ erred in “waiving” penalties pursuant to Section 13-516(b). The Commission is vested with the authority to waive penalties for reasons including technological infeasibility and acts of God.<sup>73</sup> When construing a statute, courts look to the statutory language itself as the best indication of the legislature’s intent and where the meaning of the statute is clearly expressed in the language of the statute, the courts cannot imply any other meaning.<sup>74</sup> It is difficult to reconcile from a plain reading of the statute that reluctance of the Commission to expend the resources to enforce the penalties is equal to the General Assembly’s examples of circumstances that would warrant

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<sup>72</sup> 220 ILCS 5/13-304 and 13-516

<sup>73</sup> 220 ILCS 5/13-516(b)

<sup>74</sup> *In Re Application of County Treasurer*, 308 Ill.App.3d 897 (1<sup>st</sup> Dist. 1999).

waiver. The reason given for the waiver falls far short of the examples the General Assembly provided – technological infeasibility and acts of God.

Globalcom does not agree with the ALJ's conclusion that the request for civil penalties was either mere boilerplate or had been abandoned. Quite the contrary, as Globalcom stated in its Reply Brief at page 47: "It is up to this Commission to determine if [Ameritech's] actions are sufficient to justify a statutory penalty for what Globalcom believes are repeated violations of Section 13-514." This Commission made such a finding in the Z-Tel case and should do the same in this proceeding.

Even assuming *arguendo* that this Commission is not required to initiate a second proceeding, the fact remains that there is sufficient evidence in the record to support the Commission's assessment of civil penalties. The evidence clearly showed and the ALJ concluded that Ameritech Illinois knowingly and unreasonably violated Section 13-514 of the Act.

## **V. TYPOGRAPHICAL ERRORS TO BE CORRECTED**

Page 2, Analysis: add a line space before Section III ANALYSIS;

Page 5, last paragraph of Special Access and EELs: **AGlobal@** should be changed to **AGlobalcom@**;

Page 6, in the new paragraph that begins **AI**n Counts II and IV of the...@: insert **AGlobalcom@** before the word **Aasserts@**;

Page 6, in the continued paragraph that begins with **AGlobalcom** contends in Count **IY**@: correct the left margin of the continued paragraph;

Page 6, in the continued paragraph that begins with **AGlobalcom** contends in Count **IY**@: **AGlobalcom@** should be inserted in the second sentence before the word **Aobjects@**;

Page 6, in the continued paragraph that begins with **AGlobalcom** contends in Count **IY**@: add a period **A.**@ at the end of the last sentence;

Page 6, in the paragraph that begins **AI**n Count III of the Amended Complaint...@: correct the left margin of the paragraph;

Page 7, in the paragraph that begins with **AIn Count VY@**: insert **AGlobalcom@** before the word **Aavers@**;

Page 8, paragraph **Ac@**: remove **A?@** from the section;

Page 8, third to last paragraph: replace **AGlobal@** in the last sentence with **AGlobalcom@**;

Page 14, first full paragraph: insert **Aare@** before the words **Aa higher@** in the last sentence;

Page 16, first paragraph of Fairness & Termination Charges: replace **AGlobal@** with **AGlobalcom@** in the last sentence;

Page 16, first paragraph of Fairness & Termination Charges: insert the word "could" before the words "not afford" in the last sentence;

Page 18, paragraph continued from previous page: remove a space before the first quotation mark and add a space after the first quotation mark in the second to last sentence;

Page 24, the paragraph that begins with "In March, 1996": replace the word "to" with "of" in the first sentence;

Page 27, second to last paragraph: replace **A3002@** with **A2002@**;

Page 27, second to last paragraph: replace **Afollow@** with **Afollowed@** in the last sentence;

Page 28, second paragraph of the Collocation Requirement: remove the second **AAmeritech@** in the first sentence;

Page 30, first paragraph: replace **Aeffective@** with **Aeffect@** in the last sentence;

Page 32, second full paragraph: replace **Aif@** with **Ain@** in the first sentence;

Page 41, indented quote at the top: remove the first quotation mark at very beginning of the sentence beginning **Afor a second and any...@**;

Page 41, section beginning **A83 Ill.Adm.Code 766.400 et seq. sets out specific...@**: reverse the first quotation mark of the second sentence before the word **Aif@**;

Page 41, Attorney's Fees: replace **A13-516((a)(3)@** with **A13-516(a)(3)@**;

Page 43, finding (6) continued from page 42: replace **ASection 13-814"** with **ASection 13-514"**;

Page 43, finding (9): replace **ASection 13-814"** with **ASection 13-514"**;

Page 44, first ordering paragraph of the page: remove the letter **At@** from the end of the paragraph.

## **VI. GLOBALCOM'S MOTION FOR ORAL ARGUMENT**

Pursuant to §§ 200.190 & 200.850 of the Commission's Rules of Practice, Globalcom hereby requests that the Commission hear oral argument on the major issues raised by the ALJ's Decision. The primary issue on which Globalcom urges the Commission to hear oral argument is the decision to allow Ameritech to impose termination charges on carriers converting Special Access service purchased under Ameritech's FCC tariffs to ICC tariffed EELs (Section I of this Petition for Review). Additionally, Globalcom requests that the Commission to hear oral argument on damages to be awarded in the event that the Commission does not reverse the ALJ's Decision on the above issue (Section II of this Petition for Review).

Each of the issues described above is both important and complex, making oral argument as to each issue necessary and useful. Before it renders its final Order in this docket, the Commission should have the opportunity to listen to the parties on each of these issues and ask questions that will help the Commission understand the issues.

In the event that the Commission grants this motion for oral argument, Globalcom waives the current extension of the final order date of October 23, 2002 for an additional 14 days.

## CONCLUSION

For the reasons stated above, the Commission should grant Globalcom's Petition for Review of the ALJ's Decision and make the changes set forth herein.

Respectfully submitted,

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Dated: October 1, 2002

**STATE OF ILLINOIS  
BEFORE ILLINOIS COMMERCE COMMISSION)**

Globalcom, Inc.	)	
	)	
vs.	)	ICC Docket No. 02-0365
	)	
Illinois Bell Telephone Company,	)	
d/b/a Ameritech Illinois	)	
	)	
In the Matter of a Complaint	)	
Pursuant to 220 ILCS 5/13-515,	)	
220 ILCS 10-101 and 10-108	)	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Globalcom Inc.'s Petition for Review of the Administrative Law Judge's Decision has been served upon the parties listed on the attached service list on the 1st day of October 2002, by E-docket.

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